Supreme Court, U.S.
FILED

97 1295 DEC 30 1997

OFFICE OF THE CLERK

No._____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

H. G. Gibson,

Petitioner,

v.

The National Transportation Safety Board
(NTSB),

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI

Landon Gerald Dowdey
2000 L Street, N.W.
Suite 200
Washington, D. C. 20036
(202) 416-1626

Counsel to petitioner

QUESTIONS PRESENTED

Is a report of of the National Transportation Safety Board (NTSB) establishing "the facts, circumstances, and cause or probable cause of . . . an aircraft accident" pursuant to 49 U.S.C. § 1131(a)(1)(A),

(1) subject to judicial review under 49 U.S.C. §1153(b)generally?

(2) subject to judicial review where, as here, such report finds, without a hearing, that the petitioner, Captain Gibson, the professional pilot in command, risked the lives of eighty-two passengers and a crew of seven by experimenting with slats and flaps at 39,000 feet and then lying about it?

TABLE OF CONTENTS

QUESTION PRESENTED i
TABLE OF AUTHORITIES v
OPINIONS BELOW 1
JURISDICTION 1

STATUTORY PROVISIONS INVOLVED

NTSB authority
to conduct hearing and establish facts
and probable cause of civil aircraft accidents 2
Judicial review of NTSB decisions 3

NTSB regulations of Board reports 5

STATEMENT 6
Grounds asserted for reconsideration 7
Recent consequences 9
NTSB response 9
Ninth Circuit opinion 10

REASONS FOR GRANTING THE WRIT 11
"Finality" doctrine irrelevant 12
Due process 14
The importance of preserving judicial review 14

CONCLUSION 15

APPENDIX
A. Opinion of the Ninth Circuit 7835
B. Ninth Circuit Order denying petition for
rehearing and suggestion of rehearing en banc ..... B
C. NTSB Decision Appealed ..... C 1

TABLE OF AUTHORITIES

Cases:

Abbott Laboratories v. Gardner,
387 U.S. 136, 140 (1967) 11
Board of Regents v. Roth,
408 U.S. 564, 573-574 (1972) 14
Federal Trade Commission v. Standard Oil of Cal.,
449 U.S. 232 (1980) 13
Gibson v. National Transportation Safety Board (NTSB), U.S. App. D.C. No. 95-1035 9
Graham v. Teledyne-Continental Motors,
805 F.2d 1386, 1388, n.2 , 1389-1390
(9th Cir. 1986), *cert. denied,* 484 U.S. 815 (1987)..... 11, 12
International Telephone & Telegraph Corp. v. International Brotherhood of Electrical Workers,
419 U.S. 428, 439, 443 (1975) 12-13
Joint Anti Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951) 14
Mace v. Skinner, 34 F.3d 854 (9th Cir. 1994) 14
Miller v. Rich, 845 F.2d 190 (9th Cir. 1988) 12
Oklahoma Press Publishing Co. v. Walling,
327 U.S. 186, 201 (1946) 12
Thomas Brooks Chartered v. Burnett,
920 F.2d 634, 641, 642 (10th Cir. 1990) 11, 12
UkiahValley Medical Center v.Federal Trade Commision, 911 F. 2d. 261 (9th Cir. 1990) 13

Statutes

United States Code:

5 U.S.C. § 7 *et seq.* (popularly known as the "Administrative Procedure Act" (APA) 4

5 U.S.C. § 554 (a)(3).....12
5 U.S.C. § 701(a).....4

28 U.S.C. § 1254.....1,4

Title 49, United States Code, Transportation
Chapter 11, National Transportation Safety Board
(Codification by Act of July 5, 1994, Pub.L.103-272,
§ 1(d),108 Stat. 747, amended by Act of Ocotber 25,
1994, Pub.L 103-411, § 3(c)(d) 108 Stat. 4237).....2, 3. 4

§ 1113.....2, 6
§ 1131 (a)(1)(A).....2, 6, 11,12
§ 1131 (e).....3
§ 1132.....2
§ 1132(a)(1)(A).....2
§ 1153.....3, 11
§ 1153 (a).....3
§ 1153 (b).....3, 10, 11, 12 , 14
§ 1154 (b).....14

Former Codifications:

49 U.S.C. § 1441 (a),(b),(c) (1982)
(The Federal Aviation Act of 1958,
August 23, 1958, P.L. 85-726, Title VII,
§ 701, 72 Stat.781;October 15, 1962, P.L.
87-810, §§ 1, 2, 76 Stat. 921).....2, 3, 11, 12

49 U.S.C. App 1903 (a),(b),(d)
(The Independent Safety Board Act
of 1974, January 23, 1975,Pub.L. 93 -633,
Title III, § 304, 88 Stat.2168).....2, 3 4, 11

Regulations

49 Code of Federal Regulations
Transportation
Chapter VIII—National Transportation Safety Board
Subpart C—Board Reports
(48 F.R. 52740, No. 22, 1963)

§ 840.40 5
§ 845.40 (a) 5, 6, 13
§ 845.41 ..... 5. 6, 13
§ 845.41 (a) 5

Other authorities

Federal Rules of Evidence,
Rule 803(8) 14
Advisory Committee Note
on 1974 Enactment, paragraph 8(c) 14

1994 U.S. Code Cong. and Adm. News, 818, 825. . . . .3, 4

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

H.G. Gibson,

Petitioner,

v.

The National Transportation Safety Board
(NTSB),

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

H.G. Gibson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra*) is reported at 118 F.3d 1312 (9th Cir.1997).

JURISDICTION

The Court of Appeals entered its judgment on July 7, 1997. A timely petition for rehearing and suggestion of rehearing en banc was denied October 2, 1997 (Appx. B, *infra).* The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

Title 49, United States Code, Transportation
Chapter 11, National Transportation Safety Board

Subchapter II—Organization and Administration

§. 1113. Administrative.

(a) General Authority —(1) The National Transportation Safety Board . . . may conduct hearings to carry out this chapter, administer oaths, and require, by subpoena or otherwise, necessary witnesses and evidence.

[Subsections (2),(3), and (4) detail and amplify these powers to conduct hearings in ways only tangentially relevant here.]

(Added Pub.L. 103-272, § 1 (d), July 5, 1994, 108 Stat. 747.)

[The 1994 codification derived this section from former 49 U.S.C. §1441(b) and 49 U.S.C. App1903 (b). The underlying acts of Congress are cited, *infra,* under §1131 of the codification.]

Subchapter III— Authority

§. 1131. General authority

(a) General.—(1) The National Transportation Board shall investigate or have investigated (in detail the Board prescribes) and establish the facts, circumstances, and cause or probable cause of —

(A) an aircraft accident the Board has authority to investigate under section 1132 of this title; [That section, insofar as relevant here, authorizes in subsection (a)(1)(A) investigation of "each accident involving civil aircraft."]

* * *

(e) Accident reports. — The Board shall report on the facts and circumstances of each accident investigated under subsection (a) or (b) of this section. The Board shall make each report available to the public at reasonable cost.
(Added Pub.L 103-272, § 1(d), July 5, 1994, 108 Stat. 752, and amended Pub.L. 103-411, § 3(c), October 25, 1994, 108 Stat. 4237)

[The 1994 codification of this section consolidated provisions of former 49 U.S.C. § 1441 (a) (The Federal Aviation Act of 1958, August 23, 1958, Pub.L. 85-726; Title VII, § 701, 72 Stat. 781, October 15, 1962, Pub.L. 87-810, §§ 1, 2, 76 Stat. 921) and 49 U.S.C. App 1903 (a) (The Independent Safety Board Act of 1974, January 23, 1975, Pub.L. 93 - 633, Title III, § 304, 88 Stat. 2168). No substantive change was intended by the 1994 codification. 1994 U.S.Code Cong. and Adm. News 818, 825.]

Subchapter IV—Enforcement and Penalties

§ 1153. Judicial review

(a) General.—The appropriate court of appeals of the United States or the United States Court of Appeals for the Ditrict of Columbia Circuit may review a final order of the National Transportation Safety Board under this chapter. A person disclosing a substantial interest in the order may apply for review by filing a petition no later than 60 days after the order of the Board is issued.

(b) Persons seeking judicial review of aviation matters.—**(1)** A person disclosing a substantial interest in an order related to an aviation matter issued by the Board under this chapter may apply for review of the order by filing a petition for review in the United Sates Court of Appeals for the District of Columbia Circuit or in the court

of appeals of the United States for the circuit in which the person resides or has its principal place of business. The petition must be filed not later than 60 days after the order is issued. The court may allow the petition to be filed after the 60 days if there was a reasonable ground for not filing within that 60-day period.

(2) When a petition is filed under paragraph (1) of this subsection, the clerk of the court immediately shall send a copy of the petition to the Board. The Board shall file with the court a record of the proceeding in which the order was issued.

(3) When the petition is sent to the Board, the court has exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order and may order the Board to conduct further proceedings. After reasonable notice to the Board, the court may grant interim relief by staying the order or taking other appropriate action when cause for its action exists. Findings of fact by the Board, if supported by substantial evidence, are conclusive.

(4) In reviewing an order under this subsection, the court may consider an objection to an order of the Board only if the objection was made in the proceeding conducted by the Board or if there was a reasonable ground for not making the objection in the proceeding.

(5) A decision by a court under this subsection may be reviewed only by the Supreme Court under section 1254 of title 28.

* * *

(Added Pub.L. 103-272, § 1(d), July 5, 1994, 108 Stat. 756)

[The 1994 codification of this section omitted as unnecessary the direction in former 49 U.S.C. § 1903(d) that review be in accordance with Chapter 7 of title 5, because that statute, popularly known as the "Administrative Procedure Act" (APA), "applies by its own terms." 1994 U.S. Code Cong. and Adm. News, 818, 835.]

49 Code of Federal Regulations
Transportation
Chapter VIII—National Transportation Safety Board

Subpart C—Board Reports
(48 F.R. 52740, Nov.. 22, 1963)

§ 845.40 Accident report

(a) The Board will issue a detailed narrative accident report in connection with the investigation into those accidents which the Board determines to warrant such a report. The report will set forth the facts, conditions and circumstances relating to the accident and the probable cause thereof, along with the any appropriate recommendations formulated on the basis of the investigation.

(b) the probable cause and facts, conditions and circumstances of all other accidents will be reported in a manner and form prescribed by the Board.

§ 845.41 Petitions for reconsideration of modification.

(a) Petitions for reconsideration or modification of the Board's findings and determination of probable cause filed by a party to an investigation or other person having a direct interest in the accident investigation will be entertained only if based on the discovery of new evidence or on a showing that the Board's findings are erroneous. . . .Petitions based on the discovery of new matter shall: identify the new matter, contain affidavits of prospective witnesses, authenticated documents, or both, or an explanation of why such substantiation is unavailable; and state why the new matter was not available prior to the Board's adoption of its findings. Petitions based on a claim of erroneous findings shall set forth in detail the grounds relied upon.

[Subparagraph (b) deals with service and responses. Subparagraph (c) provides discretionary oral argument.]

STATEMENT

Captain Gibson filed a petition with the National Transportation Safety Board (NTSB) for "reconsideration or modification of the Board's findings and determination of probable cause" in an air accident report issued upon the authority of 49 U.S.C. § 1331(a)(1)(A), but without any prior hearing under 49 U.S.C. § 1113 or otherwise.

Such a report is issued only in selected cases. 49 C.F.R. § 845.40(a). Although Captain Gibson was publicly deposed in the course of the investgation, he was not a party or participant. He nevertheless had standing to file a petition for rehearing by the terms of 49 C.F.R. § 845.41(a) as a "person having a direct interest in the accident investigation."

This NTSB report, read in context with the published interview of the Board's investigator in charge, found Captain Gibson guilty of risking the lives of eighty-two passengers and a crew of seven by experimenting with slats and flaps at 39,000 feet and then lying about it.

The petition sets forth the interview as published in the nationally circulated magazine, *Aviation Consumer:*

> **Did the Captain's "fooling around" cause the TWA 727 to roll over and dive from 39,000 feet last spring?** [Headline]
>
> . . . [A]ccording to Kampshror, . . . Hoping to improve high-altitude cruising per[illegible]nance, adventuresome 727 crews have been k[illegible]wn to deploy the first notch of flaps . . . . However, four of the eight leading edge slats automatically deploy when the first notch of flaps is selected. Since it is obvious that leading edge slats are a no no at Mach 0.80, part of the unofficial procedure is to pop the circuit breaker for the slats so they stay put during the flap extension . . . but it is not hard to imagine what would happen if the flight engineer acciden-

> tally popped the wrong circuit breaker. The crew has made sworn statements to the NTSB that they did nothing of the sort, but their arguments haven't been too persuasive. "I assume they're hiding something, but I can't prove it," NTSB Investigator Kampshror told the *Aviation Consumer.*

Long after the Board found the crew guilty of what Mr. Kampshror couldn't prove, his statements in this interview were verified in a deposition given by the magazine reporter in a civil damage case. Confronted with this interview in his deposition in the same case, Mr. Kampshror failed to deny its accuracy. ER I, Petition, 7-12; NTSB Report, 35; NTSB Response, 4-5; ER II, Exhibits C 3, 17-22, 24-26, D 5-13, G 2-4, 6-7.

Grounds asserted for reconsideration

The petition is based on newly discovered evidence derived largely from (a) depositions and testimony in the civil damage case which grew out the near fatal accident involved here, and (b) uncompleted investigations of recent air disasters, and near air disasters, involving rudder control problems similar to those described by the three professional pilots making up the flight crew in this case.

The new evidence revolves around the Board investigator's prejudgment just described. Depositions, documents and affidavits detail how the inquiry was sent off in the wrong direction by this groundless suspicion and why the facts the investigation ignored became so tragically prophetic. The petition and supporting exhibits run to several hundred pages, so only a brief summary is possible here.

The Board's finding that the probable cause of the accident was "the flight crew's manipulation of the flap/slat controls" is, of course, directly traceable to the suspicion voiced by the investigator in charge in the early

stages of the inquiry. In his deposition in the civil damage case, the investigator admitted that the only source of the rumor that became the Board's finding was himself. No one else had ever mentioned, let alone performed, the fantastic maneuver he attributed to the flight crew. What he couldn't prove at the outset of the investigation remained as unproven at the end as it was at the beginning. ER 1, Petition, 7-12; ER II, Exhibits A 6, C 3, 17-26, G 2-4, 6-7.

The NTSB investigator had Boeing write the finding of probable cause for the Board and authorized Boeing's secret destruction of evidence. When the Board report was announced, the NTSB investigator told the Air Line Pilot Association's representative, "You put up a good fight, but we couldn't let you fault the world's most used airplane." ER I, Petition, 19-23; ER II, Exhibits C 3, 5-10, 13-16, E 3, 13, 16-17, F 11, H 1-14, M 1.

Boeing engineers confessed, under cross examination in the civil damage case, that their scenarios about why the captain was unable to promptly recover control after the upset were based on their own misreading of the flight data recorder (FDR). These scenarios were nevertheless set forth as fact in the NTSB report and led to the Board's finding that "the Captain's untimely use of the flight controls" contributed to the accident. ER I, Petition, 12-19, NTSB Report, 32-33; ER II, Exhibits C 13-16, E 6-8, F 4-7, 11, G 5.

The NTSB investigator's prejudgment displaced entirely the uncontradicted testimony of the three profssional pilots describing the erratic response of the flight controls. Over the dissent of one Board member, the crew was denied an opportunity to respond to the charges against them. ER I, Petition, 22-23. NTSB Report, 36.

Recent consequences.

Rejecting the crew's descriptions of the control problems they experienced in 1979 became highly significant in light of later developments.

(i) In 1989 it was discovered that the same aircraft involved in the 1979 upset, N840TW, exhibited similar flight control problems in 1977. ER II, Exhibit J 1-2.

(ii) In 1990 the Air Line Pilots Association (ALPA) filed a petition for reconsideration which, in addition to a technical analysis showing why the flap/slat finding was groundless, listed nine instances of similar erratic flight control experiences with Boeing 727s. TWA filed a petition in 1991 requesting reconsideration. ER II, Exhibits K 1-2, L 1-5. The NTSB has yet to respond to the ALPA petition or the TWA petition..

(iii) An official 1991 NTSB Safety Recommendation to the Federal Aviation Administrator (August 20, 1991) recognized that the rudder controls of Boeing 727s and 737s, which share common components, suffer from dangerous flight control "anomalies." This NTSB publication issued as a consequence of the 1991 Colorada Springs crash killing twenty passengers and a crew of five. The NTSB has yet to determine the probable cause of that crash.

(iv) In 1994, in connection with its investigation of the crash of a Boeing 737 near Pittsburgh killing 132 people, the NTSB identified a large number of reported instances of rudder control problems similar to those described by Captain Gibson. The NTSB has yet to determine the probable cause of that crash.

NTSB response

In 1995 Captain Gibson filed a petition in the nature of mandamus with the D.C. Circuit, *Gibson v. National Transportation Safety Board,* U.S. App. D.C. No. 95-1035. Four days before that court's *sua sponte* order would re-

quire the Board to state why it had not acted on Captain Gibson's four year old petition for reconsideration, the Board filed a response denying the petition.

The facts set forth in Captain Gibson's petition to the NTSB and detailed in the exhibits attached are essentially undisputed in the NTSB Response. NTSB's "analysis" of these facts, however, concludes that the materials presented by Captain Gibson "do not add substantive material facts to the investigation" and therefore do not "constitute 'new evidence' on which to base a reconsideration." ER I, NTSB Response, 5 (Appx. C 1, 6, *infra*).

The factual assertions being essentially uncontradicted, their sufficiency to require a reexamination of the Board's findings and determination of probable cause is essentially a legal issue.

Captain Gibson filed a petition for review of the NTSB order denying his petition for reconsideration pursuant to 49 U.S.C. § 1153(b) which provides that a "person disclosing a substantial interest in an order related to an aviation matter issued by the Board under this chapter may apply for review of the order by filing a petition for review" in the United States court of appeals for the circuit in which he resides; that is, for Captain Gibson, the Ninth Circuit.

The Ninth Circuit opinion holds denial of Captain Gibson's petition for reconsideration unreviewable because it is not a "final order" under 49 U.S.C. § 1153. This unreviewability is derivative, however, to the asserted unreviewability of the NTSB findings in the report to which the petition for reconsideration was addressed. The Ninth Circuit explained (Appx. page 7844, *infra*):

> The NTSB regulations do not abdicate the NTSB's complete discretion to conduct its investigations as it sees fit. . . . Even if such a petition were granted . . . a reconsidered report would fall under the same

statutes and regulations that restrict the legal effect of the initial report, and would have no determinative consequences. It follows that the NTSB's denial of a petition for reconsideration of a report has no determinative consequences and is not a "final order of the [NTSB]" under 49 U.S.C. § 1153. Accordingly we have no jurisdiction under 49 U.S.C. § 1153.

REASONS FOR GRANTING THE WRIT

For the last dozen years or so the NTSB has sought to insulate its activities from the judicial review provisions of 49 U.S.C. § 1153(b) (formerly 49 U.S.C. 1903 (d)). Until the instant opinion, the circuits have rejected NTSB immunity claims. The most recent and detailed explanation is found in *Thomas Brooks Chartered v. Burnett*, 920 F.2d 634, 641-643 (10th Cir. 1990), rejecting a wide variety of NTSB immunity claims. The Ninth Circuit rejected immunity twice. *Graham v. Teledyne-Continental Motors*, 805 F.2d 1386 (9th Cir. 1986), *cert. denied*, 484 U.S. 815 (1987), denied immunity in a footnote, 805 F.2d, at 1388, note. 2. The opinion below cites this case but fails to notice the footnote. One of the Code provisions cited in that note as illustrative of reviewable limitations on NTSB authority, 49 U.S.C. § 1441 (a) (1982), is the ancestor of the present codification, 49 U.S.C. 1331(a)(1)(A), that is the exact provision under which the Board report in the present case was issued. "Nothing in the statutory language suggests that Congress intended to foreclose judicial consideration of claims that the agency exceeded those limits."[1]

---

[1] The strength of the Congressional purpose in 49 U.S.C. § 1153(b), explicitly conferring a right of judicial review on a "person disclosing a substantial interest in an order related to an aviation matter" ("final order" in §1153(a) is not used in § 1153(b)), can be measured against the presumption of judicial review, even absent a statutory mandate, as in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967).

Miller v. Rich, 845 F.2d 190 (9th Cir. 1988), found an abuse of discretion which *Graham* addressed but did not find.

These cases identify as reviewable matters precisely the events sought to be reviewed here; namely, (a) the "report [of] facts, conditions, and circumstances relating to each accident and the probable cause thereof," 49 U.S.C. § 1441 (a) (1982) cited in note 2, 805 F.2d, at 1388 (codified in 1994 without substantive change as 49 U.S.C. §1131(a)(1)(A)), and (b) the "failure of an agency to follow its own regulations," 920 F.2d, at 642.

"Finality" doctrine irrelevant

The judicial review authorized by 49 U.S.C. §1153(b), and affirmed in the cases, is not taken away by the "finality" doctrine. That doctrine is not grounds for denying judicial review, but only for postponing it.

Its typical application arises in regulatory schemes where, as here, both "investigation" and "adjudication" functions are intrusted to the same agency.

The purpose of an "investigation" is "to discover and procure evidence, not to prove a pending charge or complaint, but upon which to make one if, in the Administrator's judgment, the facts thus discovered should justify doing so." *Oklahoma Press Publishing Co. v. Walling*, 427 U.S. 186, 201 (1946).[2] Thus an "investigation" produces no "final" result. "Determinative consequences" await a subsequent "adjudication."

Due process rights to a hearing, not made available at the "investigation" level, are nevertheless preserved by the right to contest investigatory charges in a subsequent "adjudication" forum. *See, e.g., International Telephone &*

---

[2] Hearings are not required in "proceedings in which decisions rest solely on inspections, tests or elections." 5 U.S.C. § 554 (a)(3). Participation in purely investigatory activities is either not allowed, *Graham v. Teledyne-Continental Motors, supra*, or severely restricted, *Miller v. Rich, supra*.

Telegraph Corp. v. International Brotherhood of Electrical Workers, 419 U.S. 428 (1975); *Federal Trade Commission v. Standard Oil of Cal.*, 449 U.S. 232 (1980); *Ukiah Valley Medical Center v. Federal Trade Commission*, 911 F. 2d 261 (9th Cir. 1990).

NTSB operations combine "investigation" and "adjudication" functions. Until the Board, pursuant to 49 C.F.R. § 845.40 (a), issues "a detailed narrative accident report in connection with the investigation into those accidents which the Board determines to warrant such a report," there is no reviewable event. The "facts, conditions, and circumstances relating to [an] accident and the probable cause thereof" are not yet "establish[ed]."

"Determinative consequences" await the Board's report that found Captain Gibson guilty of risking the lives of eighty-two passengers and a crew of seven by experimenting with slats and flaps at 39,000 feet and then lying about it.

There are no "findings and determination of probable cause" to which a petition for reconsideration under 49 C.F.R. § 845.41(a) may be addressed until that report issues; but when that report issues, it is clearly the end of the road.

The "report" setting forth the Board's findings of fact and determination of probable cause is clearly as final a disposition as the Board will ever make. If it is not final, nothing the Board ever does is "final" and the judicial review provisions of the statute are a sham.

Where, as here, there has been no hearing, formal or otherwise, prior to the issuance of the Board's findings, the only opportunity for a hearing afforded a "person having a substantial interest in the accident investigation" is by way of a petition for reconsideration under 49 C.F.R. § 845.41(a).

Due process

The Ninth Circuit opinion minimizes the harm that flows from the issuance of a report under 49 U.S.C. § 1131(a)(1)(A) by pointing out that 49 U.S.C. § 1154 (b) makes such reports inadmissible in a "civil action for damages," [3] a matter of no concern here.

The obvious harm here, which the Ninth Circuit opinion ignores entirely, is that the Board's report finds Captain Gibson guilty of risking the lives of eighty-two passengers and a crew of seven by experimenting with slats and flaps at 39,000 feet and then lying about it.

"Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Board of Regents v. Roth,* 408 U.S. 564, 573-574 (1972); *Joint Anti Fascist Refugee Committee v. McGrath,* 341 U.S. 123 (1951). One might fruitfully ask if official censure of the professional conduct of a lawyer or judge might be proper without a hearing.

The Court can and should avoid the constitutional issue by upholding the Congressionally mandated right of judicial review, uncompromised by the inappropriate application of the "finality" doctrine. It should require the NTSB to grant Captain Gibson the kind of hearing on his petition for reconsideration that he was denied during the investigative stage of these proceedings. He should not be relegated to a Civil Rights Action like the plaintiff in *Mace v. Skinner,* 34 F.3d 854 (9th Cir. 1994) in order to secure his due process rights.

The importance of preserving judicial review

Captain Gibson's interests include, as a professional pilot, a concern for air safety generally and his own

---

[3] This provision is little more than Rule 803 (8) of the Federal Rules of Evidence provides. *See* Advisory Committee Note to 1974 Enactment, Paragraph (8)(c).

safety in particular. The outrageous conduct of the NTSB investigator in charge of this case, the resulting fatalities, and the continuing risk of such fatalities which the NTSB has yet to meaningfully address, provide persuasive evidence of why the NTSB should not be entrusted with the broad immunity from judicial scrutiny the Ninth Circuit decision confers on it.

CONCLUSION

The Court should grant certiorari and direct a remand to the Ninth Circuit with directions to examine the sufficiency of the petition to require reconsideration and a full hearing.

LANDON GERALD DOWDEY

Counsel to petitioner

APPENDIX A

Opinion of the Ninth Circuit

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

H.G. GIBSON, *Petitioner,* v. NATIONAL TRANSPORTATION SAFETY BOARD, *Respondent.*	No. 95-70525 NTSB No. NTSB-AAR-81-8 OPINION

Petition to Review the
National Transportation Safety Board's
Denial of a Petition to Reopen

Argued and Submitted
November 5, 1996—San Francisco, California

Filed July 7, 1997

Before: Paul H. Roney*, Robert R. Beezer, and Stephen S. Trott, Circuit Judges.

Per Curiam Opinion

SUMMARY

Administrative Law/Judicial Review

The court of appeals dismissed a petition for review of a decision of the National Transportation Safety Board (NTSB). The court held that a court of appeals lacks jurisdiction to

*The Honorable Paul H. Roney, United States Circuit Judge for the Eleventh Circuit, sitting by designation.

review an NTSB decision denying a pilot's petition to reconsider the findings and determinations of an air accident report.

Following an air accident aboard TWA Flight 841 in April 1979, the NTSB conducted an investigation. The ensuing report faulted the flight crew and petitioner H.G. Gibson, the pilot, for the problems underlying the accident. Under NTSB regulations, the investigation remained open for submission of new evidence.

In May 1991, Gibson filed a petition to reopen the investigation and reconsider the probable cause findings of the accident report. The NTSB denied the petition. Gibson petitioned for review.

[1] At issue was the NTSB's denial of a petition to *reconsider* the findings and probable cause determinations of an accident report, not to *reopen*. The NTSB investigation remained open even after the initial accident report and Gibson's petition was filed.

[2] The court of appeals did not have jurisdiction to review the NTSB's action. The Independent Safety Board Act grants jurisdiction over final orders of the NTSB. [3] Jurisdiction was lacking because the NTSB's denial of Gibson's petition did not constitute an "order." [4] The Administrative Procedure Act defines "order" as the whole or part of a *final disposition* of an agency in a matter other than rulemaking.

[5] The Supreme Court has determined that the term "final disposition" requires some determinate consequences for the party to the proceeding. [6] An order necessarily has determinate consequences. A definitive statement carrying the status of law and expected compliance that produces a direct and immediate effect will qualify.

[7] In the context of actions by the NTSB, the finality requirement may be satisfied by a decision that imposes an

obligation, denies a right, or fixes some legal relationship. [8] By regulation, the NTSB's initial investigations are not conducted for the purpose of determining the rights or liabilities of any person. By statute, no part of a report arising from an investigation may be admitted into evidence or used in a civil action for damages resulting from a matter mentioned in the report.

[9] The NTSB regulation under which Gibson filed his petition to reconsider did not provide a right to reconsideration of the report. Nor did Gibson cite any other statute or regulation under which the NTSB would be required to reconsider a report. The NTSB's denial did not deny him any right.

[10] NTSB regulations do not abdicate the NTSB's complete discretion to conduct its investigations as it sees fit. Denial of Gibson's petition fell within that unreviewable discretion. Even if such a petition were granted, a reconsidered report would fall under the same statutes and regulations that restricted the effect of the initial report and would have had no determinate consequences. It followed that denial of a petition for reconsideration of a report also has no determinate consequences and is not a final order of the NTSB.

COUNSEL

Landon Gerald Dowdey, Washington, D.C., and Brenda Grantland, Mill Valley, California, for the petitioner-appellant.

Anthony J. Steinmeyer and Peter R. Maier, United States Department of Justice, Washington, D.C., for the respondent-appellee.

OPINION

PER CURIAM:

Captain H.G. Gibson petitions for review of the National Transportation Safety Board's denial of his petition to reopen its investigation into TWA Flight 841's April 4, 1979 "air accident" and to reconsider its determination of the probable cause of the accident. We hold that we do not have jurisdiction under 49 U.S.C. § 1153, and we dismiss the petition to review.

On April 4, 1979, petitioner H.G. Gibson experienced severe difficulty controlling TWA Flight 841, a Boeing 727 aircraft. Gibson was the captain on Flight 841, which departed John F. Kennedy International Airport in New York en route to Minneapolis-St. Paul. Eighty-two passengers and seven crew members were aboard.

Gibson first experienced problems with the aircraft's controls as the airplane passed over Saginaw, Michigan. In Gibson's words, the aircraft "suddenly rolled uncontrollabl[y] to the right at 39,000 feet and plunged in a spiral dive some six miles toward the earth." Gibson, an experienced pilot, regained control by what he described as a "radical maneuver involving the lowering of the landing gear." Approximately forty-five minutes later, Gibson landed the aircraft at the Metropolitan Airport in Detroit, Michigan. The passengers and crew were evacuated. Eight people suffered slight injuries, while the aircraft sustained substantial damage.

The National Transportation Safety Board ("NTSB") conducted an investigation of Flight 841's "air accident" pursuant to its statutory authority. 49 U.S.C. § 1132(a)(1)(A) (mandating the NTSB investigate "each accident involving civil aircraft"). On June 9, 1981, the Board issued an accident report as required by law. *Id.* § 1131(e). The report faulted Gibson and his crew for the flight's control problems. Specifi-

cally, the report cited "the flight crew's manipulation of the flap/slat controls" and "the captain's untimely use of the flight controls" as the probable cause of the accident. The NTSB substantiated its conclusion by reference to its investigator's findings. The report ignored, in large part, the direct testimony of the crew because it was said to conflict with the relevant physical evidence.

Gibson disputes these findings and in May 1991, ten years after the report was filed, he filed a petition to reopen the NTSB's investigation into Flight 841 and to reconsider the probable cause finding of the report pursuant to 49 C.F.R. § 845.41. The Air Line Pilots Association and TWA also questioned the NTSB's findings; both filed § 845.41 petitions. In total, at least four petitions to reopen and to reconsider were filed. To date the NTSB has denied two petitions, including Gibson's.

[1] The NTSB denied Gibson's petition to reopen and reconsider on May 4, 1995. He filed a timely appeal. He asks that we review the NTSB's denial of his petition pursuant to 49 U.S.C. § 1153(b). Gibson has twice before sought judicial relief in this matter. On both occasions he petitioned the United States Court of Appeals for the District of Columbia to compel the NTSB to act on his petition to reopen and reconsider. That court denied Gibson's first request, and held his second request to be moot because the NTSB had issued a decision in the interim. At issue is the NTSBs denial of a petition to *reconsider* the findings and probable cause determinations of an accident report, not, technically, to *reopen:* the NTSB investigation at issue in this case has, under 49 C.F.R. § 845.51, remained "open" even after the initial accident report, and Gibson's petition was filed under 49 C.F.R. § 845.41 which, accordingly, speaks only of "reconsideration," not reopening.

[2] We do not have subject matter jurisdiction to review the NTSB's action. Jurisdiction is a question of law reviewed *de*

novo. Del Hur, Inc. v. National Union Fire Ins. Co. of Pittsburgh, Pa., 94 F.3d 548, 549 (9th Cir. 1996). To date, no court has directly addressed the issue whether Title 49 U.S.C. § 1153, the Independent Safety Board Act, grants jurisdiction over an NTSB denial of a petition to reopen an accident investigation.

Section 1153 grants jurisdiction over certain NTSB orders:

> (a) General.—The appropriate court of appeals of the United States or the United States Court of Appeals for the District of Columbia Circuit may review a final order of the National Transportation Safety Board under this chapter. A person disclosing a substantial interest in the order may apply for review by filing a petition not later than 60 days after the order of the Board is issued.
>
> (b) Persons seeking judicial review of aviation matters.—(1) A person disclosing a substantial interest in an order related to an aviation matter issued by the Board under this chapter may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business. The petition must be filed not later than 60 days after the order is issued. The court may allow the petition to be filed after the 60 days only if there was a reasonable ground for not filing within that 60-day period.

49 U.S.C. § 1153(a),(b)(1).

[3] Jurisdiction over this matter is lacking because the NTSB's denial of Gibson's petition does not constitute an "order," even though Gibson does satisfy several of 49 U.S.C. § 1153's jurisdictional requirements: he has a substantial

interest in this matter as the pilot of the aircraft involved in the accident; the NTSB's denial relates to an aviation matter dealt with by the Board; he resides in Nevada making the Ninth Circuit the proper court of appeals; and he petitioned for review within the requisite sixty-day period.

[4] 49 U.S.C. § 1153 carves out exclusive jurisdiction for this Court to review "final orders" of the NTSB from what would otherwise comprise district court jurisdiction to hear challenges to "final agency action," under the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (APA). Accordingly, to inform our determination of what is meant by the term "order" in 49 U.S.C. § 1153, we have first looked to the APA definition of an "order." *See Southern California Aerial Advertisers Assn v. FAA*, 881 F.2d 672, 675 (9th Cir. 1989). The APA defines "order" as "the whole or part of a *final disposition*, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing; . . . ." 5 U.S.C. § 551(2) (emphasis added).

[5] The Supreme Court has determined that the term "final disposition" requires "some determinate consequences for the party to the proceeding." *International Telephone & Telegraph Corp. v. International Brotherhood of Elec. Workers*, 419 U.S. 428, 443 (1975). Further, in a prior application of the requirement of a "final order" under 49 U.S.C. § 1486(a), the predecessor to 49 U.S.C. § 1153, we considered the similar concept of "final agency action." *Air California v. United States Dept. of Transp.*, 654 F.2d 616, 620-22 (9th Cir. 1981). In *Air California*, we noted that the Supreme Court, in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), held that FDA regulations qualified as "final agency action" because

> they were "definitive" statements of the FDA's position; they had a "direct and immediate" effect on the day-to-day business of the complaining parties; they

> had the "status of law"; and "immediate compliance with their terms was expected."

Air California, 654 F.2d at 620 (citing *Federal Trade Comm. v. Standard Oil of Cal.*, 449 U.S. 232, 239 (1980) (quoting *Abbott Laboratories*, 387 U.S. at 151-53)).

[6] *ITT* provides that an order necessarily has "determinate consequences"; *Abbott* suggests a definitive statement carrying the "status of law" and "expected compliance" that produces a "direct and immediate effect" will qualify as an order. In construing our jurisdictional authority, we must interpret such vague and general formulations of "order" in the very specific context of NTSB activity:

> The Administrative Procedure Act . . . [is] a 'basic and comprehensive regulation of procedures in many agencies' . . . . [T]he Act 'contains many compromises and generalities and, no doubt, some ambiguities.' Because it was designed to regulate administrative proceedings throughout a wide spectrum of agency activities, its language is necessarily abstract in many places. *The more we may know about the particular agency proceeding to which the Act is sought to be applied, the better we will be able to apply it.*

ITT, 419 U.S. at 439 (emphasis added) (citations omitted).

[7] In the context of actions of the NTSB and its predecessor agencies, this Court has noted that the finality requirement may be satisfied by an "agency decision which, 'imposes an obligation, denies a right, or fixes some legal relationship,' " *Mace v. Skinner*, 34 F.3d 854, 857 (9th Cir. 1994) (quoting *Atorie Air, Inc. v. FAA*, 942 F.2d 954, 960 (5th Cir. 1991)); and we have noted that "other circuits have adopted the view that whether agency action is an 'order' within the scope of [49 U.S.C. § 1153's predecessor] section 1486(a) depends on

the adequacy of the administrative record." *Southern California*, 881 F.2d at 676. Those generalizations notwithstanding, a close review of the nature of and law governing NTSB investigations and reports militates against our jurisdiction in this case.

[8] The NTSB's initial investigations, by regulation, are "not conducted for the purpose of determining the rights or liabilities of any person." 49 C.F.R. § 831.4. By statute, no part of a report arising from such an investigation "may be admitted into evidence or used in a civil action for damages resulting from a matter mentioned in the report." 49 U.S.C. § 1154(b). "[A]ttempt[s] to impose upon the NTSB investigation rules of procedural fairness reflect[ ] a misconception of the Board's mission [which is not to] determine civil liability or to adjudicate the rights of private persons, . . . [but] 'to promote transportation safety by conducting independent investigations and by formulating safety improvement recommendations.'" *Graham v. Teledyne-Continental Motors*, 805 F.2d 1386, 1389 (9th Cir. 1986) (quoting 49 U.S.C. § 1901(1) (1982)). Reports of such investigations do not entail the "determinate consequences" required of a final order that can invoke our jurisdiction.

[9] The NTSB has promulgated a regulation which provides limited circumstances under which a petition for reconsideration of a report may be entertained:

> *Petitions for reconsideration* or modification of the Board's findings and determination of probable cause . . . *will be entertained only if* based on discovery of new evidence or on a showing that the Board's findings are erroneous. The petitions shall be in writing. Petitions which are repetitious of proposed findings submitted pursuant to § 845.27, or of positions previously advanced, and petitions filed by a party to the hearing who failed to submit proposed findings pursuant to § 845.27 will not be entertained.

> Petitions based on the discovery of new matter shall: identify the new matter; contain affidavits of prospective witnesses, authenticated documents, or both, or an explanation of why such substantiation is unavailable; and state why the new matter was not available prior to Board's adoption of its findings. Petitions based on a claim of erroneous findings shall set forth in detail the grounds relied upon.

49 C.F.R. § 845.41(a) (emphasis added). Gibson filed his petition to reconsider under that section. But 49 C.F.R. § 845.41 does not provide a right to reconsideration of the report, nor has Gibson cited any other provision in the statutes or regulations under which the NTSB would ever be required to reconsider a report. So the NTSB's denial does not deny him any right under the law.

[10] The NTSB regulations do not abdicate the NTSB's complete discretion to conduct its investigations as it sees fit. The denial of Gibson's petition falls within that unreviewable discretion. Even if such a petition were granted, because NTSB investigations remain "open for the submission of new and pertinent evidence," 49 C.F.R. § 845.51, following the initial report, a reconsidered report would fall under the same statutes and regulations that restrict the legal effect of the initial report, and would have no determinate consequences. It follows that the NTSB's denial of a petition for reconsideration of a report also has no determinate consequences and is not a "final order of the [NTSB]" under 49 U.S.C. § 1153. Accordingly, we do not have jurisdiction under 49 U.S.C. § 1153.

PETITION DISMISSED.

APPENDIX B
Ninth Circuit Order denying petition
for rehearing and suggestion
of rehearing en banc

[Stamped :"FILED
October 2, 1997
Cathy A. Catterson, Clerk
U..S. Court of Appeals"]

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

H.G. GIBSON,
Petitioner,

No.95-70525
NTSB AAR-81-8

v.

ORDER

NATIONAL TRANSPORTATION
SAFETY BOARD,
Respondent.

Before: RONEY,* BEEZER, and TROTT, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judge Trott has voted to reject the suggestion of a rehearing en banc. Judges Roney and Beezer so recommend.

The full court has been advised of the suggestion for an en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for a rehearing en banc is REJECTED.

---

* The Honorable Paul H. Roney, United States Circuit Judge for the Eleventh Circuit, sitting by designation.

APPENDIX C
NTSB Decision Appealed

NATIONAL TRANSPORTATION SAFETY BOARD
Washington, D.C. 20594
May 4, 1995

Captain H.G. Gibson
Petition for Reconsideration
Aircraft Accident - Trans World Airlines, Inc.
Boeing 727-31, N840TW, Near Saginaw, Michigan
April 4, 1979
(NTSB-AAR-81-8)

RESPONSE TO PETITION FOR RECONSIDERATION

In accordance with the Safety Board's rules (49 CFR Part 845), the Safety Board has considered the May 2, 1991 Petition for Recondsideration[1] in the aviation accident involving a Trans World Airline, Inc. (TWA) Boeing 727-31, N840TW, near Saginaw, Michigan, on April 4, 1979. Based on its review of the petition and the facts derived during the course of the investigation and subsequent reviews, the National Transportation Safety Board denies the petition in its entirety.

On June 9, 1981, the Safety Board determined that the accident occurred after the airplane entered an uncontrolled maneuver at 39,000 feet while near Saginaw, Michigan. The airplane descended to about 5000 feet in 63 seconds before the flightcrew regained control and made an emergency landing at Metropolitan Airport, Detroit, Michigan. The Safety Board's analysis of the evidence indicated that the uncontrolled maneuver began after the leading edge slats were retracted and the airplane's No. 7 slat on the right wing remained in the extended or partially extended position. The isolated extension of the No. 7 leading edge slat resulted in a roll

[1] Submitted as "petition to reopen the investigation, hold a public hearing, and reconsider findings of probable cause."

which led to a reduction in the airplane's lateral control margin to zero or less. The loss of lateral control was the result of a combination of the extended slat, Mach number, angle of attack, and sideslip. The airplane entered a descending right spiral, and control of the airplane was regained only after the No. 7 slat was torn from the airplane.

The Safety Board's investigation revealed no evidence of irregularity, malfunction or failure of the airplane's flight controls, autopilot, hydraulic, or flap systems that might have caused or contributed to a lateral control problem. Further, there was no evidence of any contribution of failures or malfunctions in the airplane's flight control system that would have caused an unscheduled extension of the No. 7 leading edge slat by itself.

In adopting the report, the Safety Board determined that the probable cause of the accident was, "the isolation of the No. 7 leading edge slat in the full or partially extended position after an extension of the Nos. 2, 3, 6, and 7 leading edge slats and the subsequent retraction of the Nos. 2, 3, and 6 slats, and the captain's untimely flight control inputs to counter the roll resulting from the asymmetry. Contributing to the cause was a preexisting misalignment of the No. 7 slat which, when combined with the cruise condition airloads, interfered with the retraction of the slat. After eliminating all probable individual or combined mechanical failure or malfunctions which could lead to slat extension, the Safety Board determined that the extension of the slats was the result of the flightcrew's manipulation of the flap/slat controls. Contributing to the captain's untimely use of the flight controls was distraction due probably to his efforts to rectify the source of the control problem." Three Board Members voted to adopt the report; two Members did not participate. Member Francis McAdams, while voting to adopt the report, filed a concurring and dissenting statement.

On January 11, 1983, the Air Line Pilots Association (ALPA) submitted a Petition for Reconsideration of probable cause and a request to reopen the investigation. The Petitioner contended that it was likely that there was a mechanical failure of the 7th slat actuator which resulted in uncommanded extension. On June 24, 1983, and August 28, 1983, Petitioner provided supplemental submissions concerning slat anomalies and the validity of using the Flight Data Recorder (FDR) data to make aerodynamic drag calculations.

On December 15, 1983 the Safety Board denied the petition in its entirety. The denial stated "Petitioner has provided no new evidence in either its petition or the supplements thereto to establish a valid possibility of a mechanical failure of the Ronson actuator piston on the accident airplane. Finally, Petitioner has provided no information to show that the Board's findings as to the facts, conditions, or circumstances of the accident are erroneous, or that the Board's conclusions regarding the probable cause of the accident are incorrect." At that time, the Safety Board Members unanimously denied the petition.

On October 9, 1990, ALPA submitted another Petition for Reconsideration of probable cause. This petition consists of 116 pages and claims that the Safety Board and all parties to the investigation erroneously assumed that the No. 7 leading edge slat, which separated from the airplane in flight, was the initiating cause of the accident. ALPA stated that it now believes that the previous premise is erroneous. In a cover letter to its petition, ALPA stated that a malfunction in the rudder control system most likely contributed to the initial upset. The response to the ALPA petition is being handled separately in a manner independent of the subject petition from Captain Gibson.

On December 2, 1991, the Trans World Airlines, Inc., filed a petition to reopen the investigation, hold a public hearing, and reconsider the probable cause in the subject

accident. TWA's stated purpose of the petition was to "finally put to rest the questions raised in the petition of Captain Gibson. . . " The TWA petition is also being handled independent of the subject petition from Captain Gibson.

The Petitioner presents eight issues in the Petition, Part One, entitled, "How Problems with the Boeing 727 Flight Controls Were Covered Up in NTSB Investigation." They are as follows:

Issue No. 1, CVR system checkouts,

Issue No. 2, Rumor of slat extension by crew generated by NTSB Investigator-in-Charge,

Issue No. 3, Boeing's dogma that is impossible for slats on its 727 to deploy accidentally,

Issue No. 4, Slat deployment in this case did not occur at 39,000 feet at the beginning of the upset,

Issue No. 5, Boeing discredits its scenarios . . . but they remain in the NTSB report and finding.

Issue No. 6, Boeing writes the probable cause,

Issue No. 7, Boeing and NTSB destroy evidence, and

Issue No. 8, Crew participation frustrated.

Additional issues are presented in Part Two of the petition, entitled, "How Design Defect in Autopilot and Other Control Problems with the Boeing 727 was revealed Despite NTSB Investigation Coverup." They are as follows:

Issue No. 9, No. 7 slat extension was the result of the

dive rather than cause,

Issue No. 10, Extended No. 7 slat could not have caused the upset,

Issue No. 11, TWA concealed from the NTSB a similar control problem,

Issue No. 12, Publicity surrounding ALPA's 1990 petition leads to discovery of other problems,

Issue No. 13, "Buzz" as a result of outboard aileron bolt failure with the possible yaw damper and rudder actuating system malfunctions,

Issue No. 14, Boeing 727 grounded/ split-rudder condition,

Issue No. 15, Control problems that continue to affect Boeing 727.

The following discussion addresses the alleged new evidence and/or errors in analysis in the order presented. No. 1, the cockpit voice recorder (CVR). Petitioner states, "it is not even known whether the recorder system was functioning as intended or whether it was influenced by electrical anomalies following the emergency landing."

The Safety Board recognizes that the CVR on board the accident airplane, with its 30-minute recording duration, did not contain contemporaneous information about the accident scenario. The only audio evidence from the CVR that was available to the investigation was a brief crew conversation that was determined to have taken place after the airplane had landed in Detroit. As a result, the Safety Board concludes that the CVR information is largely irrelevant to the investigation and should not be a subject for reconsideration.

No. 2. Petitioner states, "Rumor of slat extension by crew generated by NTSB investigator-in-charge becomes foundation for Board's findings of probable cause." The "new evidence" presented by the petitioner is a series of references to an October 15, 1979 Aviation Consumer magazine article and testimony given by the Safety Board Investigator-in Charge in an April 1982 deposition for a civil damage case.

With regard to issue No. 2. Safety Board analysis of the substance of these articles and a transcript of the testimony indicated that they do not add substantive material facts to the investigation. As a result, the Safety Board concludes that this material does not constitute "new evidence" on which to base a reconsideration.

No. 3. Petitioner states, "Boeing's dogma that it is impossible for slats on its 727 to deploy accidentally." Petitioner submits as "new evidence" records of eight instances of unscheduled slat deployments on Boeing 727 flights occurring between January 12, 1978, and February 28, 1989.

With regard to issue No. 3, the Safety Board addressed the subject of the unscheduled extension of leading edge slats in the Board's Aircraft Accident Report AAR-81-8, paragraphs 1.16.1 and 1.17.2. These anomalies have occurred for a variety of reasons. In each instance the flight crew has recognized the condition and taken corrective action to control the flight path. These events are part of a continuing airworthiness effort by the Federal Aviation Administration (FAA) and the manufacturer. As a result, the Safety Board concludes that this material, as serious as it may appear, does not constitute "new evidence" on which to base a reconsideration.

No. 4. Petitioner postulates that the deployment in this case (the accident) did not occur at 39,000 feet at the beginning of the upset, but close to 12,000 feet near its end.

Petitioner offers a statement, "When the landing gear

was extended, it ruptured system A hydraulics, which according to Boeing, is what holds the slats in." Petitioner does not provide any supporting evidence for the theory at this point; however, the reader is advised that "All of this is detailed in Part II of this petition."

With regard to Issue No. 4, the Safety Board's response to this subject appears after material presented by the petitioner in Part II, Issue No. 9.

No. 5. Petitioners states that "Boeing's engineers discredit its "scenarios" about why captain unable to promptly recover control . . . but they remain in NTSB report and finding." Petitioner claims under the heading of "new evidence" that "It was Boeing's reading of the flight data recorder (FDR) — not Captain Gibson — that was "spatially disoriented." Petitioner presents material which he describes as "fictional scenarios" which were allegedly used in an investigative coverup. However, petitioner does not present new material to substantiate a claim of erroneous findings regarding the reading of the FDR or the determination of the flight path.

With regard to issue No. 5, the Safety Board's Aircraft Accident Report, AAR-81-8, addressed the subject within the analysis section, paragraph 2.5. Loss of control. The material presented therein was prepared by Safety Board staff using a variety of investigative group inputs and the professional knowledge of flight test and aircraft performance engineers. Analysis of the flight path contains neither a reference to a roll maneuver of right - then left to 220 degrees - then right, nor does its refer to any "overcontrol" theory. The Safety Board's analysis of the flight path indicates that, "At 2147-45, the aircraft was in a right bank of about 35 degrees, after which it rolled rapidly left to near a wing level attitude. About 2147.47, the aircraft began to roll again to the right , . . . " The Safety Board believes that the analysis of the flight path is as accurate and correct as can be determined using the type

of FDR that was installed in the accident airplane. As a result, and lacking evidence to the contrary, the Safety Board concludes that the petitioner has not presented material on which to base a reconsideration.

No. 6. Petitioner asserts "Boeing writes Board's finding of probable cause." As new evidence, petitioner asserts that words prepared by the Boeing company were paraphrased by the Safety Board report writer and adopted by the Board.

With regard to issue No. 6, 49 Code of Federal Regulations (CFR) 831.14 and 845.27, relating to investigations, provide and the Safety Board actively encourages the submission of proposed findings and probable cause statements. It is not unusual for the Safety Board to adopt wording that may be very similar to the submittal of one or more parties. It is within the Board's prerogative and it is, indeed, an obligation of the Safety Board Act to provide the best statement of probable cause from whatever source. As a result, the Safety Board concludes that the Petitioner has not presented material on which to base a reconsideration.

No. 7. The Petitioner charges, "Boeing and NTSB investigator destroyed evidence."

The Safety board practices regarding the return of parts that have been in the Safety Board's custody to the aircraft owner or the owners's representative have evolved over time to a formalized procedure. Likewise, investigator's source material, such as witness statements, reports, and photos that are used in the preparation of a formal report, are covered by updated procedures that set forth what should be entered into the public docket. With regard to the physical evidence related to issue No. 7, the Safety Board believes that it is more appropriate to characterize the handling of those items by the Investigator-in-Charge and the Boeing engineering personnel as disposal of excess material no longer considered neces-

sary for the continuing investigation. As a result, the Safety Board recognizes that, by current standards, such material would be handled differently. However, now lacking the evidence, and any evidence of intent, the Safety Board concludes that the petitioner has not presented material on which to base a reconsideration.

No. 8, Crew participation frustrated. During the investigation, crew members were formally deposed on two occasions. They were represented by their employer and their labor organization at all times. Investigative activity was undertaken in the traditional group manner with the participation of representatives of the flightcrew's employer and labor organization as parties to the investigation. In addition, 49 CFR 831.14 provides those concerned persons with an avenue through which to communicate directly with the Safety Board. The flightcrew did not avail themselves of this opportunity during the progress of the investigation. However, it should also be noted that it was not the practice of the Safety Board to invite or permit the involved crew members to participate actively as a member of an investigative group during the investigative process.

With regard to issue No. 8, the Safety Board believes that there was ample opportunity for the flightcrew to have made its views known during the investigative process either directly, or through their union or company representatives; however, they chose not to do so. As a result, the Safety Board concludes that the petitioner has not presented material on which to base a reconsideration.

No, 9. Petitioner states No. 7 slat extension was the result of dive rather than its cause. Petitioner refers to a portion of the Boeing company's report that states ". . . with no pre-existing damage, that slat would have departed the aircraft when its speed reached 363 KIAS when the aircraft descended to approximately 31,500 feet."

As part of the research directed toward this recon-

sideration, the Boeing Company on January 11, 1993, provided the Safety Board with a revised Figure B.2.1(7), Estimated Time of Slat Separation, which corresponds with the discussion in the Boeing Report, paragraph B.2.2.1.2. This discussion states that slat separation and departure could occur between 360 and 400 knots Equivalent Air Speed.

Petitioner theorizes that the No. 7 slat did not fail until the end of the dive maneuver. Offered as evidence are the ground trail debris and the ability of the flightcrew to extend the landing gear with "A" system hydraulic pressure.

Petitioner advances the theory that, "Had the No. 7 slat departed the aircraft early in the dive, at 31,500 feet as calculated by the Boeing Company, then "A" system hydraulic pressure would not have been available to extend the landing gear."

Petitioner's theory appears to be based on the premise that a complete failure of hydraulic system "A" is coincident with the separation of the No. 7 slat. This is not the case. Due to the small diameter of the hydraulic lines in the leading edge slat system, the hydraulic system operating pressure of 3,000 pounds per square inch (psi) will remain available after the system has been breached until the reservoir is drained, a period of several minutes.

Investigation on scene in Detroit found the area aft of No. 7 slat bathed with hydraulic fluid. However, no such bathing or evidence of escape of a considerable quantity of hydraulic fluid was observed on the wheel well.

Petitioner's statements regarding the extension of the landing gear also indicates a general assumption that the "A" hydraulic system is necessary to "extend" the landing gear. While this statement is true regarding an overall systems description, the statement requires operational clarification. When the landing gear

handle is moved to the down position while positive "G's" are applied to the airframe, the main landing gear will extend by themselves provided there is sufficient hydraulic pressure available to (1) open the internal gear door actuator locks and (2) open the landing gear uplocks. It should also be noted that opening the gear doors causes fluid to be displaced into the return lines, thereby temporarily "increasing" system quantity.

The Safety Board believes that the time interval between the loss of No. 7 slat (with concurrent hydraulic fluid escape) and the movement of the gear handle to the down position was short enough that sufficient system "A" hydraulic pressure remained to open the gear door actuator locks and to extend (and to overextend and damage) the main landing gear. However, insufficient hydraulic fluid remained in the system to bathe the landing gear from the hydraulic line when it ruptured.

With regard to issue No. 9, Safety Board review indicates that the Analysis contained in Aircraft Accident Report AAR-81-8 was based on an appropriate speed range and approximate reference to the degree of damage noted on the slat actuator and landing gear components as they relate to the hydraulic system "A" of the accident airplane. As a result, the Safety Board concludes that the petitioner has not presented material on which to base a reconsideration.

No. 10. Petitioner quotes the following, "The Boeing Company further stated that an extension of the No. 7 leading edge slat at .80 mach and 39,000 feet would have been easily controllable requiring only approximately half lateral control authority to counter the right rolling movement."

The Safety Board concurs with the above statement. However, the petitioner goes on to present a statement of conclusion, "Therefore, an extended No. 7 leading edge slat could not have caused the upset." However, the peti-

tioner does not offer any basis in fact for this conclusion.

With regard to issue No. 10, the Safety Board analysis of the accident indicated that the asymmetrical slat condition resulting from the extended No. 7 slat was part of a series of events that led to the flightcrew's loss of control. The Safety Board's probable cause statement recognizes a series of events, including slat asymmetry and, in addition, "the captain's untimely flight control inputs to counter the roll resulting from the slat asymmetry." Thus in these circumstances, the Safety Board concludes that the petitioner has not presented material on which to base a reconsideration.

The following discussion addresses the new evidence and/or errors in analysis as presented in the Petition with regard to issue No. 11. Petitioner staters that "TWA concealed from NTSB that the same aircraft previously experienced a similar control problem."

The Safety Board has reviewed the event of May 23, 1977, presented by the petitioner as (1) a similar control problem, and (2) in the same aircraft. The control problem experienced on May 23, 1977, is characterized by the Check Airman Captain as an "autopilot disconnect" malfunction. The flying pilot, another Check Airman, described the condition as follows, " . . . the auto pilot apparently disconnected (the autopilot paddles dropped in the disengaged position), but the flight controls became extremely difficult to manipulate in roll, and there was no annunciation provided to indicate the source of the problem."

The Safety Board notes that the accident scenario which took place on B-727 N840TW did not include any mention of "difficult to manipulate" flight controls. On the contrary, the captain of the accident flight offered in his testimony that "I had full (left) aileron input and full left rudder input also, and the aircraft was still rolling to the right."

The Safety Board believes that the analysis of the flightpath of the accident aircraft derived from the FDR data and the later flight test, as presented in AAR-81-8, is correct. On the basis of the evidence presented by the petitioner as comparable, the Safety Board is not able to characterize the events as similar control problems.

The petitioner characterizes activity surrounding the 1977 event as "concealed" from the Safety Board. The Safety Board does not have evidence of concealment of facts. In any event, the Safety Board does not believe that the 1977 event was a "similar control problem."

Also, there is conflicting information in the Petition for Reconsideration and associated affidavits related to which airplane experienced the 1977 autopilot disconnect malfunction. The Safety Board recognizes the inconsistencies in the archived information. However, with regard to issue No. 11, the Safety Board must evaluate the information that can be gained to support the factual record of investigation by pursuit of these inconsistencies. Regardless of which aircraft was involved in the 1977 accident, the Safety Board believes that the 1977 event was not a similar control problem as that experienced during the accident flight. As a result, the Safety Board concludes that the petitioner has not presented material on which to base a reconsideration.

No. 12. Petitioner alleges that "Publicity surrounding ALPA's 1990 petition leads to discovery of other Boeing 727 control problems." Petitioner presents a list of nine events and states, "In every case, when the pilot tried to bank the airplane or level the wings, he encountered significant resistance and the aircraft wanted to go in the opposite direction."

The Safety Board recognizes that there have been recorded instances of autopilot malfunction. However, in each of the incidents presented by the petitioner, the flight crew was able to overcome the difficulties and accom-

plish a successful landing. Also, following maintenance actions, the aircraft were returned to service. Petitioner alleges that the December 1989 TWA accident is of particular significance as it is a repeat of Flight 841 (the accident flight) at 37,000 feet.

The Safety Board does not agree. In the 1989 incident, forceful full right aileron input was required, and the malfunction was indicative of an autopilot malfunction that was manageable by the flightcrew. On the contrary, in the accident circumstances, the flightcrew debriefings, and statements and depositions related to the flight control inputs indicate that full and unimpeded movement of all flight controls was possible and applied by the crew. With regard to issue No. 12, the results of flight tests subsequent to the accident, in which full control input was available and applied, offered close comparisons with the FDR data from the accident airplane. As a result, the Safety Board concludes that the Petitioner has not presented evidence of similar problems in other airplanes on which to base a reconsideration.

No. 13. Petitioner suggests that the "buzz and turning" at the beginning of the accident flight upset was the result of outboard aileron bolt failure in flight and aileron "float" upwards. Petitioner further suggests that resultant yawing movement may have resulted in a malfunction of the yaw damper and rudder actuating system.

The Safety Board recognizes that a malfunction of either of these systems would produce recognizable yawing movements and roll response. However, the Petitioner has not provided any evidence that yawing moments associated with these systems were observed by the flightcrew or the passengers. Also, such yawing movements were not identifiable on the FDR. However, flight tests conducted after the accident did produce FDR vertical acceleration traces as a result of flap movement that

were consistent with the evidence from the accident aircraft's FDR. Likewise, drag coefficients resulting in speed changes on the flight test airplane following flap configuration changes were consistent with the speed changes observed on the FDR indicated airspeed traces from the accident airplane. As a result, the Safety Board concludes that the Petitioner has not presented material on which to base a reconsideration .

No. 14. Petitioner states "Boeing 727 grounded as this petition was being formulated." Petitioner details a split rudder condition.

The Safety Board notes that according to the maintenance report associated with this event, the malfunction described above ceased when the autopilot was disengaged. Petitioner implies that any manner of flight control anomaly should be regarded as an event similar to the flight control difficulties experienced on the accident flight.

The Safety Board is concerned that any flight control anomaly has the potential to become a serious hazard to flight. However, the Board attempts to keep such anomalies in perspective regarding the airworthiness of the affected aircraft. With regard to issue No. 14, the Safety Board's analysis of the reported event indicates that the flight condition was fully controllable and correctable. As a result, the Safety Board concludes that Petitioner's statement describing a split rudder condition and uncommanded yaw does not, in itself, constitute "new evidence" on which to base reconsideration of probable cause.

No. 15, The Petitioner suggests that control problems that affected TWA flight 841 continue to affect B727s.

With regard to the overall focus of issue No. 15, and alleged control problems that continue to affect B-727s, petitioner does not provide specifics or evidence. The Safety Board's analysis indicates that the charge of con-

tinuing problems similar to those evident on the accident flight has not been verified. As a result the Safety Board concludes that the Petitioner's presentation of continuing control problems does not constitute "new evidence" on which to reopen the investigation or base a reconsideration of probable cause.

Also in the Petition in the Nature of Mandamus filed January 13, 1995, petitioner alleges that there is "a dangerous design defect in both the Boeing 727 and Boeing 737...," and that investigation of the March 3, 1991, Boeing 737 accident at Colorado Springs, Colorado revealed, "Boeing 727s and Boeing 737s share a common control defect."

Comparative review of the B-727 and B-737 rudder systems indicates basic design differences. The B-727 has independent upper and lower rudders, each connected to an independent power control unit (PCU). Each of the PCU's control valves are of a single spool design. The upper PCU is powered by the "B" hydraulic system and the lower PCU is powered by the "A" hydraulic system. There are load limit features built into the hydraulic power sources for the PCUs.The airplane is also equipped with two yaw damper systems which function independently through the respective upper and lower PCUs. Rudder travel is +27.5 degrees; however, yaw damper authority is limited to +/- 5 degrees.

The B-737, by comparison, has a single rudder surface, and one main rudder PCU of a different design. The PCU is of a dual concentric control valve design which incorporates hydraulic power from both the "A and B" hydraulic systems. The airplane also has one yaw damper system operating at the PCU, which is limited to 2° or 3°, depending on the model of the airplane.

There is one similar component (with a different part number) for the B-727 and B-737 rudder system, the standby rudder actuator. However, it should be noted that in the B-727 application, the standby actuator func-

tions only on the lower rudder. In the event of a B-727 malfunction of either the upper or lower rudder control systems or the yaw damper systems, or in the standby rudder system, sufficient lateral control authority has been demonstrated in the flight regime encountered during the subject accident to overcome any uncommanded rudder deflections up to and including full control deflection of either the upper or lower rudder or yaw damper system. Therefore, with respect to the theory of a common control defect between the B-727 and B-737, the Safety Board concludes that the petitioner has not presented evidence regarding this issue on which to base a reconsideration.

Finally, the airworthiness of the B-737 lateral control system has been examined extensively as part of the ongoing investigation of the USAir 427 accident at Pittsburgh. If during the consideration of the USAir investigation, or any future accident or incident investigation, and airworthiness problem is identified that could result in loss of control of the B-727, those findings will be analyzed in depth.

With regard to the probable cause, the Safety Board has considered the petition to reopen the investigation, hold a public hearing, and reconsider findings of probable cause. As a result, the Safety Board concludes that the Petitioner has not provided new evidence or shown that the Board's findings as to the facts, conditions, or circumstances of the accident are erroneous, or that the Board's conclusions regarding the probable cause are incorrect.

Accordingly, Captain H. G. Gibson's petition for reconsiderations of May 2, 1991, to reopen the investigation, hold a public hearing, and reconsider findings of probable cause is hereby denied.

Chairman HALL, Vice Chairman FRANCIS, and Member HAMMERSCHMIDT concurred in the disposition of this petition for reconsideration.